NO.: 89-1699

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IN THE UNITED STATES SUPREME COURT

OCTOBER 1989 TERM

ROBERT D. HAMM and
WILLIAM H. WILLIAMS

Petitioners,

v.

DENNIS NORRED and
BRUCE JOHNSON,

Defendants.

PETITION FOR WRIT OF CERTIORARI

ON WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NO.: 88-3166

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QUESTIONS PRESENTED FOR REVIEW

QUESTION I: Should a Fourth Amendment "reasonableness" test be decided by a jury when there are conflicting facts in an excessive force claim and the defendant has claimed qualified immunity?

QUESTION II: When deputy sheriffs are sued individually and in their official capacities, does a defense of qualified immunity nullify a judgment against the deputies in their official capacity?

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STATEMENT OF JURISDICTION

Judgment was entered by the District Court on January 13, 1989.

Opinion of the United States Court of Appeal, Eleventh Circuit, was rendered June 6, 1989.

Rehearing was granted and opinion rendered January 29, 1990.

This Court has jurisdiction to review by Writ of Certiorari pursuant to 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

United States Constitution, Amendment [IV.]

Searches and seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment [XI.]

Suits against states

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of any Foreign State.

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STATEMENT OF THE CASE

On September 27, 1984, plaintiffs, Hamm and Williams, filed a complaint in the United States District Court for the Northern District of Florida, Pensacola Division, against defendants, Powell, Norred and Johnson, pursuant to 42 U.S.C. 1983. The District Court had jurisdiction pursuant to 28 U.S.C. 1343. The lawsuit also alleged a pending state law claim against all defendants. Defendant, Sheriff Powell, was granted a summary judgment. The plaintiffs filed an amended complaint on December 10, 1985, suing defendants, Norred and Johnson, individually and in their official capacities. On January 11-13, 1988, a jury trial was held.

This case arises out of an incident that occurred on October 26, 1982, when an individual named Marlin Wiggins attempted a marijuana buy from Bob Hamm and William Williams near Fortune's Hardware Store in Santa Rosa County, Florida.

On the afternoon of October 26, 1982, Newman Andrews, who owned and operated the Elco Truck Stop near Milton, Florida, noticed a green station wagon parked in the parking lot and the occupant, who was later identified as the informant, Marlin Wiggins, appeared to be on drugs or to have been drinking. "His pupils were enlarged and his eyes were glassy." Wiggins asked Andrews if he knew Bob Hamm. Later on that afternoon, Hamm, who had only seen the informant twice before October 26, and who was with Hamm's brother on both those occasions, again saw Wiggins when he came to Hamm's house and asked Hamm where he was going that night. Hamm explained that he was going to the Elco Truck Stop. On one prior occasion, Hamm and the informant had engaged in a conversation at Hamm's brother's home and Wiggins had told Hamm that he needed to go to Georgia because someone was after him and he needed "some stuff" to take up there and sell. Wiggins bragged about what he had and Hamm tried to

out talk him. Again on October 26, 1986, when Wiggins was at Hamm's home, Wiggins stated again that he needed some "stuff". Hamm held up a bag containing a six-pack of beer and two packs of Red Man chewing tobacco and said that he had the "stuff." The informant asked Hamm where he would be that evening and Hamm said he was going to the Elco Truck Stop.

Evidently, after this conversation, Wiggins arrived at the Santa Rosa County Sheriff's Office and talked to Sgt. Paul Pridgen and stated that he had some information on a drug deal that would take place that night at approximately 11:00 p.m. The informant stated that Bob Hamm and a man named "Hub" would be involved in the drug deal. Pridgen, a deputy sheriff, indicated that the informant, Wiggins, was intoxicated and asked for coffee to sober up. Sgt. Pridgen stated that based on the information that Wiggins gave him that night and because of Wiggins' condition, Pridgen would not have

used Wiggins as a confidential informer. Pridgen, however, put the informant in touch with defendant, Bruce Johnson, a narcotics officer with the Santa Rosa County Sheriff's Office.

Bruce Johnson then called defendant, Dennis Norred, who was the chief deputy of the Santa Rosa County Sheriff's Office, at home. Norred went to the Sheriff's Office and talked to the informant. Norred did not know Wiggins,s nor had he ever used him before and knew nothing about him. The report that Norred made stated "Mr. Johnson did not have time to check with the Okaloosa County Sheriff's Office to determine the reliability of the confidential informant, Marlin Wiggins." The officers in Okaloosa County were working that night and could not be contacted.

Sometime after that, the plaintiff, Hamm and Williams, drove to the Elco Truck Stop and Williams testified that the informant, Wiggins, looked drunk when he saw him that

evening at the truck stop. Wiggins arrived at the truck stop after Hamm and Williams and the conversation went back and forth about "the stuff." Hamm was just joking and said that he could not get him any "stuff" anyway. At that point, Hamm and Williams drove away from the Elco Truck Stop and Wiggins followed. Williams did not want Hamm or Wiggins to stop at his house because they were drinking, so he told Hamm to stop at Fortune's Hardware about a mile from the Elco Truck Stop and tell Wiggins.

Norred and Johnson had placed a wire on the confidential informant which allowed them to hear the confidential informant but he could not hear them. As they proceeded down the highway, the defendants Norred and Johnson attempted to blink their lights at Wiggins to call him off but he continued driving behind Hamm and Williams.

Upon arriving at Fortune's store, Wiggins vehicle pulled up near Hamm and Hamm was out of the vehicle at the store for five

or six seconds and then got back into the jeep. As Hamm and Williams started to leave, two headlights came at them and a car rammed the front fender of the vehicle.

At this point the testimony of the officers begins to conflict, however, and officer Johnson stated that the jeep rammed their vehicle. The officer also stated that they identified themselves with a warning and identified themselves by shouting that they were law enforcement officers and that the plaintiffs were armed and in fact fired a shot. Norred and Johnson also claimed that their blue light was on the entire time, however in the criminal trial, officer Johnson did not recall if the blue light was on the dash. The plaintiffs stated that there was no blue light on the vehicle and they could not tell who was in the other vehicle and they did not hear any warning. Both plaintiffs were extremely frightened.

Francis Faulk who ran a grocery store in the Fortunes Hardware building at the time of

the incident and who was sleeping in his store that night because of previous burglaries, heard cars in the parking lot and looked out. Faulk did not see a blue light or hear anyone say anything. After Faulk heard the shots, he watched out of the window and a blue light finally came on after the jeep was stopped and he saw someone lying down beside it.

At that point the confidential informant Wiggins fled the area in a green stationwagon and a bolo (be on the look out) was put out for him. The informant has not been located since he was released from custody on that night.

As Hamm and Williams attempted to flee the unknown attackers, shots were fired into the side and back of the jeep, striking both plaintiffs. Hamm was shot in the side and Williams received a two-inch cut on his head.

Hamm was ordered out of the vehicle and he fell on the ground. As he lay there on his face, Norred approached and hit him in

the back. As he got to jail he had pain in his back and had not had pain before. Dr. Tappan found a ruptured disc and referred him to Dr. Holmes who twice did surgery.

Johnson claimed that he saw a muzzle flash from the jeep but no weapon was found on Hamm or Williams. There was a .22 revolver in the glove compartment loaded with rat shot but it had not been fired. Also Officer Johnson stated that he had been mistaken about everything that he had stated in the previous criminal trial of Hamm as to distance, location of the vehicles, location of the plaintiffs and the officers during the wrecking and shooting episode.

The photograph of the jeep was introduced as plaintiffs' exhibit 23 which showed that the shots were made to the left rear of the vehicle passing forward through the jeep.

In addition, no marijuana was found except (what appeared to be) marijuana residue in a military type canvas pouch. Plaintiff Hamm said that his sons ride to

Eglin and picked up things like the military pouch and shells.

Williams spent two nights in jail. Hamm was charged with aggravated battery, aggravated assault and conspiring to sell marijuana. Probable cause was found against Hamm and Williams as a result of the ruling by the Magistrate based on an affidavit submitted by the defendants Norred and Johnson indicating that they had warned the plaintiffs to stop and also had a blue light flashing at the time prior to the arrest. Hamm was later tried on the criminal charges and acquitted.

At the close of the plaintiffs' case, the defendants moved for a directed verdict on all counts. The Court denied the motion on the issue of probable cause to arrest and granted a directed verdict for the defendants on the Fourth Amendment claim for excessive force. The Court denied a directed verdict on the Fifth and Fourteenth Amendment excessive force claims. Once the jury verdict was returned in favor of the plaintiffs on the

issue of probable cause to arrest and excessive force under the Fifth and Fourteenth Amendments, the Court granted a JNOV in favor of the defendants on the issue of probable cause. The defendants then appealed the jury verdict and the plaintiffs appealed the following issues: (1) the lower Court's granting a dismissal on the issue of probable cause to arrest after the jury verdict; (2) granting a directed verdict on the issue of qualified good faith immunity on the Fourth Amendment claim; and, (3) the Court's ruling that this was an arrest case rather than a detention case on the issue of probable cause and failing to present the issue of probable cause to detain after the initial arrest to the jury.

On appeal the Eleventh Circuit Court of Appeals held defendants were entitled to qualified immunity and Eleventh Amendment immunity in their official capacity. Appellants asked for rehearing which was granted and the Eleventh Circuit then held

that their previous discussion of substantive due process was unnecessary due to the recent holding in Graham v. Conner, ____U.S.____, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1985), and there was no need to reach the issue of official immunity even though the court had previously requested counsel to address that issue in supplemental briefs. Appellants will show that no such request was ever made nor is there any shown on the docket of the Clerk's records in this case.

On motion for rehearing, the issue of official immunity as to deputy sheriffs in the State of Florida was thoroughly briefed with the case law holding that deputy sheriffs are county officials, not state officials, and not entitled to Eleventh Amendment immunity. The Eleventh Circuit withdrew that portion of its decision on rehearing as to Eleventh Amendment immunity and held the force defendants used to effect the arrest was reasonable under the Fourth Amendment and that qualified immunity

protects the defendants in this matter and "that is all the immunity they need." From that ruling Appellants ask for Writs.

ARGUMENT

QUESTION I: Should a Fourth Amendment "reasonableness" test be decided by a jury when there are conflicting facts in an excessive force claim and the defendant has claimed qualified immunity?

The Eleventh Circuit Court of Appeals has decided an important question of federal law which conflicts with the decision of other federal courts of appeal on the same matter and it is a question which has not but should be settled by this Court.

The instant case was stayed by the trial court and held in abeyance until an en banc decision in Gilmere v. City of Atlanta, 774 F.2d 1495 (11 Cir. 1985) was reported. The Eleventh Circuit decision in Gilmere, supra was in conflict with Tennessee v. Garner, 471, U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d (1985), which held that excessive force claims should generally be analyzed under the Fourth Amendment's reasonableness standard, not under the due process clause. Notwithstanding that fact the jury in the instant

case was instructed on Johnson v. Glick, 481 F.2d 1208 (2nd Cir. 1983) cert. denied 414 U.S. 1083, 945 Ct. 462, 38 L.Ed.2d 324 (1973), factors to decide the excessive force claim.

The district court granted a directed verdict in favor of the defendants on the Fourth Amendment excessive force claim before it went to the jury stating that at the time of the incident in question there did not exist a Fourth Amendment basis to attack the use of deadly force in making an arrest and therefore the defendants were entitled to immunity. On appeal the Eleventh Circuit Court of Appeals held the defendants were entitled to qualified immunity and Eleventh Amendment immunity in their official capacity. On Motion for Rehearing, the Eleventh Circuit Court of Appeals held that the previous discussion of substantive due process was unnecessary due to Graham v. Conner, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1985).

The Court of Appeals, also on rehearing, held the force the defendants used to effect the arrest was reasonable under the Fourth Amendment, and that defendants were protected by qualified immunity. The Court of Appeals erred in refusing to return this matter to the district court to have the jury determine the issue of excessive force under the objective reasonableness test set out in Graham, supra. This is especially so in light of the conflicting facts that were set forth in this case.

The facts in this case are highly disputed. Plaintiff and defendants give very different versions of what took place on the night of plaintiffs' arrest. The veracity of the officers was at issue and the jury, even though instructed under a more stringent test, (substantive due process) obviously did not believe defendant's version and did not believe the officers' actions were reasonable under the circumstances.

The reasonableness of the officers' actions that night begins with the question of whether the alleged confidential informant, Marlin Wiggins, was so drunk that he was incapable of providing reliable information and carrying out a drug bust. The owner of the Elco Truck Stop, Newman Andrews, testified at trial that on the afternoon of the incident, Wiggins "pupils were enlarged and his eyes were glassy." Andrews further stated that Wiggins appeared to be on drugs or to have been drinking. This was corroborated by Sergeant Paul Pridgen of the Santa Rosa county Sheriff's Office who indicated that Wiggins was intoxicated and asked for a cup of coffee to sober up that evening. Even though Wiggins appeared to be drinking Sgt. Pridgen placed Wiggins in contact with Bruce Johnson, a narcotics officer with the Santa Rosa County Sheriff's Office. The testimony was neither Johnson nor Norred, the defendants in this case, were able to contact anyone at the Okaloosa County Sheriff's

Office to determine the reliability of the confidential informant prior to the time that they sent Wiggins out to make a drug deal.

Even after Wiggins was leaving Elco Truck Stop, the officers attempted to flash their headlights at Wiggins to call him off, since he was going to an unknown location other than the well lighted Elco Truck Stop to make the deal. The question of whether blue lights were on the vehicle or whether the officers identified themselves as police officers was a hotly disputed issue at trial and the only independent observer was Francis Faulk who was inside his grocery store and observed part of the scene. He testified at trial that the police officers did not have on their blue lights nor any siren until an ambulance came at some time after Hamm was on the ground. There is also a great deal of difference in testimony between the parties over the fact that gun shots were fired at the defendants' vehicle. The testimony and evidence indicated that no shots were fired

by either Hamm or Williams and their windows were in fact up on the vehicle. Nevertheless, their car was rammed twice and then shots were fired into the rear of the vehicle as it was leaving the scene. The bullets that entered the Hamm vehicle were lodged in the front dashboard and in Hamm. As Hamm got out of the vehicle and fell on the ground, he was kicked or kneed by Norred.

A jury using the objective reasonableness test could conclude from a totality of circumstances that the officers should have handled the situation differently. First there is a question about the reliability of the confidential informant and whether in fact he was sober enough to conduct the operation that night. This alone should have prevented the operation from taking place. In addition, there seems to be a definite issue as to why the police officers would have lied about identifying themselves as police officers and having their blue lights on when the incident occurred. Further, the

act that they rammed the vehicle twice and fired shots at the vehicle as it was leaving the scene indicates that there was a lack of reasonableness on the part of the defendants. In addition, walking over to a person who the police officers claim was shooting at them and hitting him in the back does not seem to coincide with an officer in fear of retaliation because the plaintiff was armed. If the officer had thought that someone was shooting at him it seems that he would have had the man stand and raise his arms from a distance rather than walking over to him and hitting him in the back. These facts all create jury questions to which no jury has yet been charged.

The reasonableness test under Fourth Amendment "is not capable of precise definition or mechanical application. Bell v. Wolfish, 441 U.S. 520, 559, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447 (1979), however its proper application requires careful attention to the facts and circumstances of each

particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Graham v. Conner, supra, p. 1871. Graham calls for a look at the "totality of circumstances."

It is important to note that in Thorsted v. Kelly, 858 F.2d 571 (9th Cir. 1988), the Court held that "the question of whether a reasonable officer placed in the circumstances faced by Kelly could reasonably believe that his conduct was legal is a fact-specific one, and was appropriately given to the jury." The Thorsted case dealt with the issue of qualified immunity in an excessive force claim and that case was sent back to the jury on the Fourth Amendment reasonableness test.

The Tenth Circuit, in Zuchel v. Spinharney, 890 F.2d 273 (10th Cir., 1989) dealt with the issue of qualified immunity

in an excessive force claim also. Guided by the Court's decision in Graham v. Conner, supra, and the Board of Education v. Pico, 457 U.S. 853, 864, 102 S.Ct. 2799, 2806, 73 L.Ed.2d 435 (1982), the Court of Appeals for the Tenth Circuit held that genuine issues of material fact precluded judicial determination of whether the officer's conduct was objectively reasonable.

In Zuchel, supra, the deceased, Zuchel, was shot four times when one teenager shouted to approaching officers that Zuchel had a knife. The knife turned out to be a pair of fingernail clippers.

Officer Spinharney conceded Zuchel had a clearly established right to be free from excessive force. There was conflicting evidence concerning the actual circumstances under which Zuchel was shot. The Court said:

> "Contrary to Spinarney's contention that all that is involved in a determination of immunity is a characterization of facts, ...we believe this record contains sufficient evidence which, if believed by a trier of fact,

> could support a finding that Spinharney's conduct was not objectively reasonable."

The officers in the instant case claim immunity because they had probable cause to arrest and therefore have license to use any conduct they desire because the Florida law at the time gave them the right to use deadly force. The Florida Statute, however, contained the reservation that the officer was justified in the use of any force which "he reasonably believes to be necessary." It is not a license to kill based on probable cause to arrest.

The Ninth Circuit also held in Finklestein v. Bergna, 881 F.2d 702 (9th Cir. 1989), that it is for the jury to decide whether conduct is reasonable in light of clearly established law, citing Brady, 859 F.2d at 1556 and Thorsted v. Kelly, supra.

The issue of qualified immunity in an excessive force claim was addressed in Calamia v. City of New York, 879 F.2d 1025 (2nd Cir. 1980). In that case, the Second

Circuit Court of Appeals held:

> "The right of an individual not to be subjected to excessive force has long been clearly established. Thus, the question here was whether it was objectively reasonable for Sutton to believe that his treatment of Calamia did not violate that right. This was a matter as to which the facts were not undisputed, and hence it was a question to be answered by a properly instructed jury. Accordingly Sutton was not entitled to judgment N.O.V. on the ground of qualified immunity."

There is a conflict among circuits because the Eleventh Circuit has determined in the instant case that even though there is a conflict in the facts the actions of the officers were objectively reasonable. In other circuits this question has been returned to the jury to determine whether the excessive force was reasonable under the Fourth Amendment. This case should be reversed and set back to the District Court and have a jury determine if the actions of the officers in this case were reasonable in light of the Graham, supra, Fourth Amendment reasonableness test.

QUESTION II: When deputy sheriffs are sued individually and in their official capacities, does a defense of qualified immunity nullify a judgment against the deputies in their official capacity?

Deputies Norred and Johnson were sued individually and in their official capacities and judgment rendered in favor of plaintiffs. The Eleventh Circuit Court of Appeals reversed the judgment against defendants saying they were entitled to Eleventh Amendment immunity in their official capacity, and qualified good faith immunity in their individual capacity.

On petition for rehearing and suggestion for rehearing en banc, appellants argued defendants were not entitled to Eleventh Amendment immunity. On rehearing, the Court of Appeals said they did not need to reach the issue of official immunity at all. The Court said defendants were protected by qualified immunity and "that is all the immunity they need."

The Eleventh Circuit Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court.

The only immunities available in an official-capacity action are forms of sovereign immunity that the entity may possess such as the Eleventh Amendment. Kentucky v. Graham, 105 S.Ct. 3099 (1985).

The county sheriff and his deputies under the Florida Constitution, Art. 8, Sec. 1(d) are officers of the county, not of the state, and not entitled to Eleventh Amendment immunity. Mt. Healthy School District v. Doyle, 429 U.S. 274, 281-82, 97 S.Ct. 568, 572-73, 50 L.Ed. 2d 471 (1977); Travelers Indemnity Co. v. School Board of Dade County, 666 F.2d 505, 509 (11th Cir.), cer. denied, 459 U.S. 834, 103 S.Ct. 77, 74 L.Ed. 2d 74 (1982); Tuveson v. Fla. Governor's Council on Indian Affairs, Inc., 734 F.2d 730 (11th Cir. 1984).

The defense of objectively reasonable reliance on existing law (qualified immunity) is not available in an official-capacity action. Kentucky v. Graham, id.; Lundgren v. McDaniel, 814 F.2d 600 (11th Cir. 1987); Owen v. City of Independence, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed. 2d 673 (1980); Brandon v. Holt, 469 U.S. 464, 105 S.Ct. 873, 83 L.Ed. 2d 878 (1985).

In Barts v. Joyner, 865 F.2d 1187 (11th Cir. 1989), the Eleventh Circuit Court of Appeals held that qualified immunity is no defense to an action brought against someone in his official capacity, citing Fitzgerald v. McDaniel, 833 F.2d 1516, 1520 (11th Cir. 1987).

The judgment in Barts v. Joyner, id, was against the defendants in both their official and individual capacities. The Court stated, "Appellants have never contended that the judgment is not in conformity with the pleadings, proof and issues in the District Court." ..."The judgment of liability against

defendants in their official capacity stands; and we must turn to a consideration of damages."

The decision in this case not only conflicts with applicable decisions of this Court, but with prior circuit precedent.

Even if defendants were entitled to qualified immunity, the judgment should not be reversed against them in their official capacity.

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APPENDIX

Robert D. Hamm and William H. Williams,

Plaintiffs,

v.

Dennis Norred and Bruce Johnson

Defendants,

No. PCA 84-4465-RV.

United States District Court

Northern District of Florida

January 13, 1988.

This action came before the Court and a jury with the Honorable Roger Vinson, U.S. District Judge, presiding. The issues have been tried and the jury has rendered its verdict.

It is ordered and adjudged

that the plaintiff Robert D. Hamm recover of the defendants Dennis Norred and Bruce Johnson the sum of $200,000.00, with interest therein at the rate of 7.22% as provided by law, and his costs of action;

that the plaintiff William H. Williams recover of the defendants Dennis Norred and Bruce Johnson the sum of $85,000.00, with

interest thereon at the rate of 7.22% as provided by law, and his costs of action.

Robert D. Hamm, Alice Hamm, William H. William, and Kathryn Williams, Plaintiffs-Appellees, Cross-Appellants,

v.

Sheriff James A. POWELL, etc., Defendant,

Dennis Norred, individually and in his capacity as Sheriff Deputy of Santa Rosa County, Florida, Bruce Johnson, individually and in his capacity as Sheriff Deputy of Santa Rosa County, Florida, Defendants-Appellants, Cross-Appellees.

No. 88-3166.

United States Court of Appeals, Eleventh Circuit.

June 6, 1989.

Plaintiffs who had been injured in encounter with law enforcement officers brought civil rights action for officers' alleged violations of Fourth, Fifth, Eighth, and Fourteenth Amendment rights. The United States District Court for the Northern

District of Florida, No. PCA-84-4465-RV, C. Roger Vinson, J., entered judgment in favor of plaintiffs on excessive force and substantive due process claims, and appeal was taken. The Court of Appeals, Hill, Circuit Judge, held that: (1) failure to grant directed verdict to officers and plaintiffs' false arrest claim, until after false arrest and excessive force claims had both been submitted to jury, constituted reversible error, and (2) qualified immunity applies to excessive force claim based on substantive due process as well as to claim based on Fourth Amendment.

Reversed.

1. Arrest 63.4, 63.4(7, 9)

Officers acting on tip from police informant regarding alleged drug buy, who wired informant prior to buy and overheard remarks which apparently verified tip, had "probable cause" to arrest parties identified by informant as dealers. U.S.C.A. Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

2. Civil Rights 13.14

Federal Courts 907

Failure to grant directed verdict to officers on civil rights plaintiffs' false arrest claim, until after false arrest and excessive force claims had both been submitted to jury, constituted reversible error, where jury's finding of insufficient cause to arrest led inevitably to a conclusion that force employed in connection with arrest was excessive.

3. Counties 146

Florida county sheriffs and deputies are "state agents" for sovereign immunity purposes.

See publication Words and Phrases for other judicial constructions and definitions.

4. Federal Courts 266

Florida has not waived its Eleventh Amendment immunity for itself or its agencies and subdivisions, including its officers in

their official capacities. U.S.C.A. Const. Amend. 11.

5. Civil Rights 13.8(1)

Civil rights defendant does not waive defense of qualified immunity merely by choosing not to take immediate appeal from denial of motion for summary judgment on qualified immunity grounds.

6. Civil Rights 13.8(4)

Officers were protected by qualified immunity for their use of deadly force in order to effect a lawful arrest of fleeing narcotics suspects where, at time of incident, law in area was still unsettled.

7. Civil Rights 13.8(1)

Qualified immunity applies to excessive force claims based on both the Fourth Amendment and on substantive due process. U.S.C.A. Const.Amends. 4, 14.

Appeals from the United States District Court for the Northern District of Florida.

Before HILL and ANDERSON,

Circuit Judges, and ESCHBACH*,

Senior Circuit Judge.

HILL, Circuit Judge:

Appellees were injured in an encounter with the appellants, law enforcement officers, who were undertaking to arrest appellees. The officers were armed. They had been warned that appellants were armed. The encounter, at night, was fraught with danger. The parties' vehicles collided; shots were fired. Robert D. Hamm was struck in his side by a bullet. William H. Williams received a cut on his head. Both were arrested, and Hamm was tried and acquitted. They have brought suit against the officers.

Although there were mixed findings and holdings in the trial court, each appellee achieved an award of damages. We conclude that even though appellees did suffer bodily

*Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

injury in their arrests on charges ultimately dismissed, they were not entitled to recover against the law enforcement officers, and we reverse.

FACTS

In the evening of October 26, 1982, Marlon Wiggins entered the Santa Rosa County Sheriff's office and informed Sgt. Paul Pridgen that he had information concerning a drug deal to occur later that night. Wiggins said that Bob Hamm and a man named "Hub," later identified as William H. Williams, would be involved. Although Sgt. Pridgen believed that Wiggins was slightly intoxicated and might not be fully reliable, he called Bruce Johnson, a narcotics officer with the sheriff's office, who in turn contacted Dennis Norred, Chief Deputy of the office.

Upon Norred's arrival at the sheriff's office, Wiggins related that recently he had given the sheriff's department in adjacent Okaloosa County information regarding drug

deals. Although Norred's police report read that Johnson did not have time to verify Wiggins reliability by checking with the Okaloosa County Sheriff's office, both Johnson and an officer from Okaloosa County testified that the Okaloosa officer reported to Johnson on the telephone that Wiggins was reliable because more than a dozen drug dealers had been arrested based on information obtained through Wiggins.

Wiggins told Norred that he had met with Hamm earlier that day and had requested Hamm to supply him with "some stuff" to sell. Hamm had held up a bag (which Hamm later testified contained a six-pack of beer and two packs of chewing tobacco) and replied that he had "some stuff right here." In response to Wiggins' inquiry regarding where Hamm was going to be that evening, Hamm told him that he was going to go to the nearby Elco Truck Stop. After placing a listening device on Wiggins, Norred and Johnson, in an unmarked police car, followed Wiggins'

vehicle to the truck stop.

Wiggins met Hamm in the truck stop's parking lot while "Hub" Williams remained in Hamm's Land Rover vehicle. In a conversation heard by appellants through the listening device, Wiggins asked whether Hamm had the "stuff," and Hamm responded by asking whether Wiggins brought money. Hamm would not allow Wiggins to see the "stuff" unless Wiggins showed him money. Then, Wiggins became angry, and Hamm left to take Williams home. When Wiggins asked Hamm where he was going, Hamm replied that he was "going down the road." Wiggins said that he would follow Hamm.

At Williams' request, Hamm turned off the road into the parking lot of Faulk's or Fortune's Store, about a mile from the truck stop. Hamm left his vehicle for a moment, told Wiggins that he would meet with him in a short while after he took Williams home, returned to his vehicle, and began to drive out of the parking lot. Norred and Johnson

believed that the conversations that they had overhead confirmed Wiggins' tip that a drug deal would occur. They had followed Hamm's and Wiggins' vehicles, and at a time when all three vehicles were at the Fortune Store's parking lot, Wiggins told the officers through the transmitter that Hamm and Williams possessed "the dope" and guns.

As Hamm drove towards the exit of the parking lot, Norred, believing Hamm was trying to flee, tried to block the exit. The vehicles collided and a chase ensued. Appellees testified that they never saw a flashing blue light on the other car and did not know their pursuers were policemen. Hamm testified that he told Williams that "[I've] undoubtedly convinced this joker [Wiggins] ... that I've got something" and that the pursuers might be associates of Wiggins trying to take away "the stuff". At one point when the vehicles were entangled, Johnson observed a flash from the Land Rover and shouted "muzzle flash" to Norred. Once

the vehicles came to a momentary stop off the road, Norred jumped from his car and shouted, "Halt, police." As the Land Rover started again and passed the officers, they fired their guns at the vehicle. Hamm was struck by a bullet in his side, and Williams received a cut on his head. Norred and Johnson continued to pursue the Land Rover until it stopped a short distance away. Hamm was arrested at the scene. Williams ran into the woods and was arrested later at his house.

No weapon was found on Hamm or Williams. A .22 caliber revolver in the glove compartment had not been fired. No drugs, except for marijuana residue in a canvas pouch, were found. Williams was detained in jail for two days and was released. Hamm was later tried on criminal charges and acquitted.

DISTRICT COURT PROCEEDINGS

In September, 1984, Hamm and Williams filed a complaint against Norred, Johnson, and James A. Powell, sheriff of Santa Rosa

County. After summary judgment was granted for Powell, plaintiffs filed an amended complaint against Norred and Johnson, individually and as sheriff's deputies of Santa Rosa County. Included among plaintiffs' claims were allegations of violations of the Fourth, Fifth, Eight, and Fourteenth Amendments and claims under 42 U.S.C. 1983. The district court denied Norred and Johnson's motion for summary judgment based on qualified immunity grounds; defendants did not then appeal. In a supplemental pre-trial order issued in January, 1988, the district court declared that only false arrest and excessive force claims remained to be tried. During the jury trial, plaintiffs attempted to introduce evidence relating to defendant's probable cause to detain, as distinguished from defendants' probable cause to arrest. The judge denied testimony as to detention, expressing that the case is an "arrest case" and not a "detention case".

At the close of plaintiffs' case, defendants moved for a directed verdict on all counts. The court denied the motion on the issue of probable cause to arrest, stating that, although the "overwhelming evidence" indicates that the officers had probable cause to arrest, there was sufficient evidence to indicate that reasonable jurors could possibly find that there was not probable cause. The district judge granted a directed verdict in favor of the defendants on qualified immunity grounds regarding plaintiffs' Fourth Amendment claim of excessive force, but denied defendants' motion for directed verdict based on qualified immunity concerning the plaintiffs' Fifth and Fourteenth Amendments' claim of excessive force. Regarding the Fourth Amendment claim, the court reasoned that at the time of the incident in question there did not exist a Fourth Amendment basis to attack the use of deadly force in making arrest, and therefore defendants were

entitled to qualified immunity. In contrast, as to the excessive force claim brought under the Fifth and Fourteenth Amendments, the court concluded that qualified immunity does not apply to a substantive due process claim. Rather, the court decided that the Johnson v. Glick factors apply and should be decided upon by the jury.[1]

At the close of all evidence, defendants renewed motions for summary judgment on all claims. The district court reserved judgment regarding the false arrest claim and stated

1. In Johnson v. Glick, 481 F.2d 1028 (2nd Cir. 1973), the Second Circuit wrote in analyzing a substantive due process claim for excessive force: "...a court must look to such factors as the need for the application of force, the relationship between the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." 481 F.2d at 1033. The Eleventh Circuit had adopted the Johnson v. Glick factors as the guiding standards for substantive due process claims. Gilmere v. City of Atlanta, GA, 774 F.2d 1495, 1509 (11th Cir. 1985). Neither Johnson nor Gilmere involved a defense of qualified immunity.

that a jury issue existed as regards to the substantive due process excessive force claim. The jury verdict was returned in favor of the Plaintiff on both the false arrest and excessive force under the Fifth and Fourteenth Amendments claims. Robert Hamm was awarded $200,000, and "Hub" Williams received $85,000 in compensatory damages. Immediately following the reading of the jury's verdict, the district judge granted defendants' motion for a directed verdict on the false arrest claim, but let stand the jury's verdict on the excessive force claim and awards of damages.

DISCUSSION

Probable Cause

Appellants Norrod and Johnson assert two arguments addressing the probable cause to arrest issue. First, they contend that the trial court erred in failing to grant their motion for directed verdict regarding the false arrest claim until after the jury returned a verdict. Second, appellants

maintain that the trial court erred in denying their motion for a new trial on the question of damages, after the court had granted their motion for directed verdict concerning false arrest.

[1] We hold for appellants regarding both contentions. It is clear that the officers had probable cause to arrest.[2] Information regarding a drug deal received from an informer was apparently verified by the subsequent conversation between the

2. On cross-appeal, Hamm and Williams argue that the district court erred in granting a directed verdict on the false arrest claim after the jury had decided differently. We find no merit in their contention that whether probable cause to arrest existed in this case presented a genuine issue of material fact that should not be resolved by a directed verdict.

We also reject cross-appellants' argument that the court erred in ruling at trial that this was only an "arrest" case and not a "detention" case and thus not presenting the issue of probable cause to detain to the jury. At most, the district court's decision was harmless error for there was probable cause to detain. Even though the gun found at the scene had not been fired and only marijuana residue had been found, the officers had cause to believe that they had been fired upon and that a drug deal had been about to occur.

informer and suspected drug dealer that appellants overheard through the listening device. Even appellee Hamm testified that he believed that his words and actions had convinced Wiggins that he possessed and was willing to sell drugs. Moreover, moments before attempting the arrest, appellants were told by the informant, who had been in the appellees' presence, that the appellees possessed drugs and guns. Having received all of this information, appellants reasonably believed that appellees were involved in selling drugs; they had probable cause to make an arrest.

[2] Although the district court properly granted a directed verdict in favor of the appellants on the false arrest claim, it did not do so until after receiving the jury's verdict. The case was submitted to the jury with the constitutionality of the arrest an open question. The jury's findings of insufficient cause to arrest lead inevitably to a conclusion that the force employed

in the arrest was excessive. The failure to instruct the jury that appellants had adequate cause for the arrest prejudiced them as to appellees' excessive force claim. Furthermore, with regard to the compensatory damages awards, it is impossible to determine how the jury meant to allocate the awards between the false arrest and excessive force claims. Consequently, the jury's verdict regarding the excessive force claim and the damages awards may not stand.

Immunity

[3,4] Appellants were sued both in their official and personal capacities. Appellants correctly point out that they are protected in their official capacities because Florida has not waived its Eleventh Amendment immunity for actions under section 1983.[3]

3. County sheriffs and deputies in Florida are state agents for official immunity purposes. Beard v. Hambrick, 396 So.2d 708 (Fla. 1981) (construing 768.28, Fla.Stat.). Florida has not waived its Eleventh Amendment immunity for itself or its agencies and subdivisions, including its officers in their official capacities. Gamble v. Florida Dept.

Regarding appellants' being named in their individual capacities as well, both parties challenge the district court's decisions concerning appellants' qualified immunity. Appellants contend that the trial court erred in denying their motion for directed verdict on the ground of qualified good faith immunity regarding appellees' excessive force claim under the Fifth and Fourteenth Amendments. On cross-appeal, appellees argue that the trial court erred in granting appellants' motion for directed verdict on the ground of qualified good faith immunity regarding their excessive force claim based on the Fourth Amendment.

[5] To support their position that appellants are not eligible for qualified immunity regarding the excessive force claim based on either the Fourth Amendment

of Health and Rehabilitative Services, 779 F.2d 1509 (11th Cir. 1986); Spooner v. Department of Corrections, 514 So.2d 1077 (Fla. 1987); Hill v. Department of Corrections, 513 So.2d 129 (Fla. 1987).

or substantive due process grounds, Hamm and Williams argue that appellants have waived the qualified immunity defense by not invoking it prior to jury trial. As noted above, the district court has denied appellants' pre-trial motion for summary judgment based on qualified immunity grounds, and appellants did not appeal even though a denial of claim of qualified immunity is an immediately appealable order. Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). Citing the Supreme Court cases of Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), and Mitchell, appellees state that qualified immunity entails not merely a defense to liability but also an entitlement not to stand trial. They contend that, because appellants did not appeal the denial of summary judgment and did stand trial, appellants waived their qualified immunity defense.

The defense of qualified immunity is not waived if an official chooses not to take an immediate appeal from the denial of a motion for summary judgment. Matherne v. Wilson, 851 F.2d 752 (5th Cir. 1988).[4] Mitchell permitted the immediate appeal of an interlocutory order, but it did not require such appeal. By not appealing the denial of summary judgment and standing trial, appellants obviously waived their entitlement not to stand trial. Nevertheless, they did not waive their right not to be held liable for conduct that did not violate clearly established law.

[6] In Harlow, the Supreme Court reshaped the doctrine of qualified immunity and held that "government officials

4. See McIntosh v. Weinberger, 810 F.2d 1411, 1431 n. 7 (8th Cir. 1987) ("failure immediately to appeal the rejection of a qualified-immunity defense does not bar raising it on appeal after trial"), cert. denied, _____U.S._____, 108 S.Ct. 2870, 101 L.Ed.2d 905 (1988); see also In re Chicken Antitrust Litigation American Poultry, 669 F.2d 228, 236 (5th Cir. Unit B 1982).

performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818, 102 S.Ct. at 2727. When granting a directed verdict in favor of appellants regarding appellees' Fourth Amendment claim of excessive force, the district court reasoned that at the time of the incident giving rise to this case, Florida law was either unsettled, or if it were settled, it was settled to the effect that deadly force could be used in effecting a lawful arrest.[5] In addition, it was not until three years after this incident that the Supreme Court held that the use of force to stop a fleeing felon is unconstitutional

5. Prior to Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), no Fourth Amendment basis existed to challenge the use of deadly force to make a lawful arrest. In fact, appellants' conduct apparently was authorized by Fla.Stat. 776.05 that provides: "A law enforcement officer, or any person whom he has summoned or

unless the officer has probable cause to believe the suspect poses a significant threat of death or physical injury to him or others. Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985); see Lundgren v. McDaniel, 814 F.2d 600, 603 (11th Cir. 1987). In attempting to make an arrest for which they had probable cause, appellants, in 1982, reasonably could have believed that engaging in a vehicular collision and firing shots did not violate clearly established statutory or constitutional rights.[6] Thus,

directed to assist him, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest or when necessarily committed in retaking felons who have escaped or when necessarily committed in arresting felons fleeing from justice." See Lundgren v. McDaniel, 814 F.2d 600, 603 (1987).

6. Appellees urge that the district court's denial of a directed verdict for appellants regarding the Fifth and Fourteenth Amendment excessive force claim was correct. They contend that they can rebut appellants' immunity by showing that appellants lacked good faith in using force to effect their

we affirm the district court's grant of directed verdict in favor of appellants on qualified immunity grounds regarding appellees' excessive force claim based on the Fourth Amendment.

[7] In denying appellants' motion for directed verdict on appellees' excessive force claim based on the Fifth and Fourteenth Amendments, the district court incorrectly stated that qualified immunity does not apply to substantive due process claims. See Clark v. Evans, 840 F.2d 876 (11th Cir. 1988); Acoff v. Abston, 762 F.2d 1543 (11th Cir. 1985). Qualified immunity applies to the excessive force claim based on substantive due process as well as to the claim based on

arrest. In Harlow, the Supreme Court clearly rejected such a subjective test in favor of the objective test delineated therein. Recently, this court held that "[t]he official's subjective beliefs about the legality of this conduct are irrelevant." Herren v. Bower, 850 F.2d 1543, 1546 (11th Cir. 1988) citing Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)); Parker v. Williams, 855 F2d 763, 772 (11th Cir. 1988).

the Fourth Amendment. Therefore, we reverse the district court's denial of appellants' motion for directed verdict regarding the claim based on substantive due process.

The judgment of the district court is REVERSED.

Robert D. Hamm, Alice Hamm, William H. William, and Kathryn Williams, Plaintiffs-Appellees, Cross-Appellants,

v.

Sheriff James A. POWELL, etc., Defendant,

Dennis Norred, individually and in his capacity as Sheriff Deputy of Santa Rosa County, Florida, Bruce Johnson, individually and in his capacity as Sheriff Deputy of Santa Rosa County, Florida, Defendants-Appellants, Cross-Appellees.

No. 88-3166.

United States Court of Appeals, Eleventh Circuit.

Jan. 29, 1990.

Appeal from the United States District Court for the Northern District of Florida.

PETITION FOR REHEARING AND SUGGESTION OF REHEARING IN BANC

(Opinion 6/6/89 11th Cir. 874 F.2d 766).*

*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

Before ANDERSON, Circuit Judge, HILL and ESCHBACH**, Senior Circuit Judges.

HILL, Senior Circuit Judge:

Plaintiffs petition for rehearing in this matter, and suggest a rehearing en banc of this court's opinion in Hamm v. Powell, 874 F.2d 766 (11th Cir. 1989). We grant the petition for rehearing. Since the original arguments in this case, the Supreme Court has decided Graham v. Connor, _____U.S._____, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1985), a case which has a major impact upon the issues, and our analysis of, this case.

Under Graham, the Supreme Court made clear that in arrest cases of this sort, courts must analyze claims of wrongful arrest and force "under the Fourth Amendment's 'objective reasonableness' standard." Graham, 109 S.Ct. at 1867. Thus, Graham has

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made our discussion in Hamm of substantive due process under the Fifth and Fourteenth Amendments unnecessary.

In Hamm, we correctly analyzed the qualified immunity of the defendants, and found them immune from the claims asserted in that case. The parties to that appeal did not argue the issue of official immunity to this court. The appellants merely stated that official immunity protected them; the appellees made no response. Although we have requested counsel to address that issue in supplemental briefs, we now conclude that we need not reach that issue at all.

We have held, and do hold, that qualified immunity protects the defendants in this matter. That is all the immunity they need.

We now strike that part of the opinion discussing the defendant's official immunity. We strike as well so much of the opinion that analyzed the plaintiffs' claims under the framework governed by Fifth and Fourteenth Amendment substantive due process. We now

hold that the force the defendants used to effect the arrest was reasonable under the Fourth Amendment. With these qualifications in mind, we reinstate our original opinion.

The judgment of the district court is REVERSED.

Except to the extent herein granted, the petition for rehearing is denied and, no judge in regular active service on the court having requested that the court be polled on rehearing in banc, the suggestion for rehearing in banc is DENIED.